IN THE

Supreme Court of the United States

October Term, 1975

No. 75-626

WILLIAM H. NOLAN, on behalf of himself and all others similarly situated,

Petitioner,

v.

RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER, THOMAS WHITE, LESLIE C. KISSICK and MICHAEL N. SOTTILE, as Administrators and Trustees of the Profit Sharing Plan for the Employees of Merrill Lynch, Pierce, Fenner & Smith, Incorporated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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WILLIAM H. NOLAN, on behalf of himself and all others similarly situated,

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RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER, THOMAS WHITE, LESLIE C. KISSICK and MICHAEL N. SOTTILE, as Administrators and Trustees of the Profit Sharing Plan for the Employees of Merrill Lynch, Pierce, Fenner & Smith, Incorporated,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

The complaint was filed on August 23, 1974. It alleged that petitioner was employed by Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") from 1957 until 1968 and that during this period of employment he participated in a non-contributory profit sharing plan for the exclusive benefit of Merrill Lynch's employees (the

"Plan") (Complaint ¶¶ Fifth, Sixth, 2-3a).* The Plan, which was administered by respondents, was amended in December, 1960 to include the following forfeiture provision:

> 11.1 A participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960 (Complaint ¶ Tenth, 4a).

The forfeiture provision was operative for a period of six months after an employee's termination of employment; any units not forfeited during that period were required to be paid to the employee (Plan, Art. 7.1, 11a). All forfeited units were reallocated among continuing participants of the Plan (Plan, Art. 4.7, 11a).

Article 22.1 of the Plan provided, finally, that:

> "The validity of the Plan or any of the Provisions thereof shall be determined under and shall be construed according to the laws of the State of New York." (11a).

In or about October, 1968, petitioner left Merrill Lynch's employ and went to work for a competitor (Complaint ¶ Eleventh, 4a). Units which had accrued to his account

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* The suffix "a" refers to the Appendix to this Brief.

prior to December 30, 1960 were paid to him in full (*Ibid.*). Units which had accrued after that date were forfeited pursuant to the above provision (*Ibid.*).

In the complaint petitioner sought a declaratory judgment that the forfeiture provision of the Plan was void and unenforceable on the ground that it violated the common law of New York State and the "legislative intent and public policy considerations" of the Sherman Antitrust Act, 15 U.S.C.A. §§ 1, *et seq.* (1973), Subchapter D of the Internal Revenue Code of 1954, 26 U.S.C.A. §§ 401, *et seq.* (1967), and the Welfare and Pension Plans Disclosure Act, 29 U.S.C.A. §§ 301, *et seq.* (1975), in that it allegedly constituted an "unreasonable restraint upon competition" (Complaint ¶ Thirteenth, 7-8a). Federal jurisdiction was purportedly based on diversity of citizenship, the alleged existence of a federal question under the above-cited statutes and "upon the common law under the principles of pendent jurisdiction" (Complaint ¶ First, 1a). Petitioner did *not* purport to invoke federal question jurisdiction under 28 U.S.C.A. § 1331 (1966) on the basis of a "federal common law" of profit sharing plans.

Respondents moved in the District Court to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. It was pointed out on that motion that petitioner's Sherman Act claim was barred by the four year limitation on actions under that statute (Petition, p. 2a)* and that the Court lacked diversity jurisdiction, inasmuch as one of the respondents was, like petitioner, a New Jersey citizen (Petition, p. 5a). Petitioner then argued, for the first time, that the District Court had jurisdiction over the action based on federal common law.

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* Reference is to the Appendix to the Petition for Certiorari.

Reasons for Denying the Writ

POINT I

There is no federal common law applicable to the case at bar.

Petitioner seeks to create a federal common law of pension and profit sharing plans, based upon Congressional concern, as evidenced by certain federal statutes which mention or relate to pension plans, i.e., the Internal Revenue Code and the Welfare and Pension Plans Disclosure Act. It is clear, however, that neither statute provides the basis for a private right of action. See *Barlow* v. *Marriott Corp.*, 328 F. Supp. 624 (D. Md. 1971), and *Leiberman* v. *Cook*, 343 F. Supp. 558, 561-562 (W.D. Pa. 1972). Similarly, the Pension Act of 1974, 29 U.S.C.A. §§ 1001, *et seq.* (1975), does not apply to "any cause of action which arose . . . before January 1, 1975." 29 U.S.C.A. § 1144 (1975).

Lower federal courts have repeatedly determined that the various statutes dealing with pension or profit sharing plans do not create any new body of federal common law. *Beam* v. *International Organization of Masters, Mates and Pilots*, 511 F.2d 975 (2d Cir. 1975) (traditional trust concepts should apply to the trustees of a labor-management trust rather than any new federal standards); *Cuff* v. *Gleason*, 515 F.2d 127 (2d Cir. 1975) (allegations of arbitrary application of rules of a jointly administered pension trust do not give rise to federal jurisdiction under the various statutes in the labor relations field); *Haley* v. *Palatnick*, 509 F.2d 1038, 1042 (2d Cir. 1975) (*dicta:* a breach of fiduciary duty by a pension plan trustee would not violate federal law as it existed before 1974).

Petitioner's claim of federal question jurisdiction is particularly unconvincing inasmuch as the "federal common law" which he claims was violated has nothing to do with either the Internal Revenue Code or the other statutes he cites. The only claim petitioner makes against the Plan is that it "enervates free competition in interstate commerce and constitutes an unreasonable restraint on competition at common law." (Petition, p. 5). In other words, petitioner is attempting to use Congressional concern underlying federal statutes which are irrelevant to the alleged wrongdoing of which he complains solely to get his foot in a federal courthouse door. Once in, he proposes the adoption of a federal common law of restraint on competition, which would replace his time-barred Sherman Act claim. As the Court of Appeals aptly observed in this case:

> "It is hardly necessary to imply from the Internal Revenue Code or the Welfare and Pension [Plans] Disclosure Act a suggestion of illegality in restraint of trade when Congress, decades before either statute was enacted, dealt comprehensively with restraints of trade in the Sherman Anti-Trust Act. If there is any federal cause of action it is the specific statutory one granted by the private remedy provisions of the anti-trust laws. That cause of action, Nolan concedes, is time barred." (Petition, p. 12a).

POINT II

This Court has already rejected petitioner's argument that profit sharing plans should be judged in accordance with a uniform federal standard.

The very forfeiture provision of the very Plan at issue in this case was before this Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117 (1973). As the

Court of Appeals noted (Petition, p. 10a), this Court's disposition in *Ware* is a "formidable obstacle" to petitioner's argument. In the *Ware* case, this Court held that the validity of the forfeiture provision could be decided differently under the laws of different states. Whereas the forfeiture provision had been held invalid in California, it was conceded that New York law was "more permissive." 414 U.S. at 133. This Court rejected the arguments that the Plan operated on a national level, that employment pursuant to the Plan was interstate in nature and that the application of California statutes would "unduly burden interstate commerce." 414 U.S. at 140.

In the *Ware* case, therefore, this Court declined to hold that a uniform federal standard should govern the validity of the forfeiture provision at issue in this case. Respondent respectfully submits that the Court of Appeals was eminently correct in holding that *Ware* is dispositive of petitioner's argument that this Plan should be governed by some newly found federal common law of profit sharing plans.

POINT III

Several recent decisions of this Court are dispositive of the claims made in the petition.

In several recent decisions, this Court has had occasion to lay down the principles under which federal causes of action, and federal jurisdiction, may be implied from the existence of federal statutes.

In *Passenger Corp.* v. *Passengers Assn. (Amtrak)*, 414 U.S. 453, 457-458 (1974), this Court stated:

> "It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."

In this action, the common law antitrust claim which petitioner advocates has nothing to do with the statutes from which he argues such a claim should be implied.

This Court also recently pointed out, in *Amtrak* and in *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975):

> "[E]xpress statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the legislature." 421 U.S. at 419.

In this case, Congress' express provision in Section 4 of the Clayton Act, 15 U.S.C.A. § 15 (1973), of a private remedy for a violation of the antitrust laws clearly militates against the implication of an additional remedy, not subject to the Clayton Act period of limitation.

The mere fact that petitioner and others like him may be the beneficiaries of Congressional concern does not imply that such concern results in a federal cause of action in the absence of some clear Congressional purpose which the cause of action would fulfill:

> "Congress' primary purpose in enacting SIPA and creating the SIPC was, of course, the protection of investors. It does not follow, however, that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering that purpose." *SIPC* v. *Barbour, supra*, 421 U.S. at 412.

See also *University of Chicago and Argonne* v. *McDaniel*, 44 U.S.L.W. 3199 (U.S. October 6, 1975), *vacating* 512 F.2d 583 (7th Cir. 1975).

In this case, there is no connection between the statutes cited by petitioner and the relief which he hopes to obtain. He is not simply asking this Court to provide him with a federal action for a particular violation of a particular statutory provision. He is asking this Court to translate what he discerns as a Congressional "concern" with pension and profit sharing plans into an entirely new federal regulatory scheme, including authority to deal with any anti-competitive effects of such plans. This type of reasoning was pressed upon this Court in *SIPC* v. *Barbour*, *supra*, and decisively rejected as follows:

> "There is, after all, a real difference between a court's implying a right of action to effectuate the purposes of a statute and its cutting a code of procedure out of whole cloth." *SIPC* v. *Barbour, supra*, 421 U.S. at 423 n.

Furthermore, it is particularly improper for a court to create a private right of action pursuant to statutes containing "no standards of conduct that a private action could help to enforce" and "no general grant of jurisdiction to the district courts." *SIPC* v. *Barbour, supra*, 421 U.S. at 424.

In considering whether to imply a federal cause of action, it must also be considered whether the subject matter is traditionally governed by state law. As this Court asked in *Cort* v. *Ash*, 422 U.S. 66 (1975):

> "[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to

> infer a cause of action based solely on federal law?" 422 U.S. at ————, 45 L. Ed. 2d at 36.

The Court determined in *Cort* that conduct which presumably would violate 18 U.S.C.A. § 610 (1975 Supp.), a criminal provision applying to political contributions, did not give rise to an implied derivative cause of action to recover political contributions illegally made by a corporation. One of the reasons for the Court's decision was that state law, which normally governs the conduct of corporations, may expressly permit the type of contributions which the petitioner sought to recover.

In this case, as the Court of Appeals noted (Petition, p. 11a), the forfeiture provision of the Plan which petitioner seeks to challenge has already been found not to constitute an unreasonable restraint of trade under the applicable New York State law. See *Smith* v. *Meyer*, 78 Misc.2d 711, 357 N.Y.S.2d 586 (Sup. Ct. N.Y. Co. 1973), *aff'd*, 44 App. Div.2d 778, 355 N.Y.S.2d 314 (1st Dept. 1974), *leave to appeal denied*, 34 N.Y.2d 517, 358 N.Y.S.2d 1026 (1974).

The above-cited decisions of this Court clearly rebut petitioner's contention that his complaint should give rise to an implied right of action and an implied grant of federal jurisdiction.

Conclusion

The Petitioner has made no credible claim of federal subject matter jurisdiction based on the federal common law or any other source. Several recent decisions of this Court have shown that no federal claim should be implied here. In the *Ware* case, this Court decided that state law should be applied to the very provision of the Plan at issue in this action. The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
November 20, 1975

Respectfully submitted,

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APPENDIX

Class Action Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WILLIAM H. NOLAN, on behalf of himself and all others similarly situated,

Plaintiff,

against

RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER, THOMAS WHITE, LESLIE C. KISSICK AND MICHAEL N. SOTTILE, AS ADMINISTRATORS AND TRUSTEES OF THE PROFIT SHARING PLAN FOR THE EMPLOYEES OF MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED,

Defendants.

Plaintiff, by his attorney, MILTON S. ZEIBERG, on behalf of himself and all others similarly situated, complaining of the defendants, respectfully alleges:

JURISDICTION AND VENUE

First: Jurisdiction is founded on diversity of citizenship and amount and upon the existence of a federal question based upon the Sherman Anti-Trust Act, 15 U.S.C.A. § 1, *et seq.;* the Internal Revenue Code of 1954, as amended, Subchapter D—Deferred Compensation, 26 U.S.C.A. § 401, *et seq.;* the Welfare and Pension Plans Disclosure Act, 29 U.S.C.A. § 301, *et seq.*; and upon the common law under the principles of pendent jurisdiction. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

Second: Venue is based in the Southern District of New York, the place where the principal place of business of the defendants is located.

Third: Upon information and belief, at all of the times hereinafter mentioned, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED was and still is a corporation duly organized under the laws of the State of Delaware engaged and qualified to conduct a general securities business in the State of New York and in other states of the United States in interstate commerce and succeeded to the business of MERRILL LYNCH, PIERCE, FENNER & BEANE and MERRILL LYNCH, PIERCE, FENNER & SMITH, partnerships. For purposes of brevity, the aforesaid corporation and partnerships are hereinafter collectively referred to as "MERRILL LYNCH."

Fourth: Upon information and belief the defendants Richard B. Meyer, Carl Antenucci, Steve Narker, Thomas White, Leslie C. Kissick and Michael N. Sottile were and still are Administrators and Trustees of the Profit-Sharing Plan For The Employees of Merrill Lynch ("PLAN"), and were and still are in control of the general administration of the PLAN together with others.

Fifth: At all of the times hereinafter mentioned, the plaintiff, WILLIAM H. NOLAN was a citizen of the State of New Jersey. In about 1957, the plaintiff was employed by MERRILL LYNCH as an account executive (registered representative) and was in the continued employment of MERRILL LYNCH for a period of about 11 years until 1968, at which time plaintiff voluntarily resigned from his employment at MERRILL LYNCH and became employed by another New York Stock Exchange firm.

THE PROFIT-SHARING PLAN

Sixth: In about 1945, MERRILL LYNCH, as employer, adopted a Profit-Sharing Plan For The Employees of Merrill Lynch for the exclusive benefit of its employees, and qualified the said PLAN with the Internal Revenue Service pursuant to the provisions of 26 U.S.C.A. § 401, *et seq.;* and, thereafter, as such employer MERRILL LYNCH made regular contributions from its profits to the said PLAN on behalf of the plaintiff and the members of the class hereinafter described.

Seventh: From its inception and at the times herein mentioned, the terms, conditions and administration of the PLAN and in particular, its forfeiture provision for future competitive employment by a former employee were subject to the provisions of the Sherman Anti-Trust Act, 15 U.S.C.A. § 1, *et seq.;* the Internal Revenue Code of 1954, as amended, Subchapter D—Deferred Compensation, 26 U.S.C.A. § 401 *et seq.;* the Welfare and Pension Plans Disclosure Act, 29 U.S.C.A. § 1 *et seq.;* and, the legislative intendments and public policy considerations of each of said acts as well as the common law.

Eighth: At the times mentioned herein, the defendants, and each of them, had the legal duty of a fiduciary to the plaintiff and members of the class herein with respect to the administration of the PLAN.

Ninth: At the times mentioned herein, MERRILL LYNCH held out the PLAN as additional compensation to its employees, including plaintiff and members of the class herein, who would exclusively benefit from the payments made by MERRILL LYNCH into the PLAN out of its net profits as

additional compensation in consideration of services rendered to MERRILL LYNCH.

Tenth: The said PLAN in pertinent part contained the following provision with respect to forfeiture by a participant of the PLAN of his profit-sharing benefits including plaintiff and members of the class herein, in the event he left the employ of MERRILL LYNCH and joined a competitor:

> "Forfeiture of Benefits
>
> "11.1 A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960."

Eleventh: Between 1957 and 1968, plaintiff accumulated beneficial interests in the PLAN of about Sixteen Thousand ($16,000) Dollars. In 1968, after about 11 years of employment at MERRILL LYNCH, plaintiff voluntarily left MERRILL LYNCH's employ and was employed by another New York Stock Exchange firm. The defendants herein by reason of such employment declared plaintiff's profit-sharing benefits were forfeit under Article 11.1 of the PLAN. On about October 15, 1968, defendants paid plaintiff the accumulated benefits under the PLAN due up to December 30, 1960 and refused to pay the plaintiff the accumulated benefits due on and after December 30, 1960, and thereby declared said benefits forfeit.

CLASS ACTION ALLEGATIONS

Twelfth: Plaintiff brings this action in his own behalf and in a representative capacity in behalf of himself and all other former employees of MERRILL LYNCH who acquired beneficial interests in the PLAN during their employment by MERRILL LYNCH and which were declared forfeit and have not been paid by the Administrators and Trustees of the PLAN by reason of the provision of Article 11.1 of the PLAN.

(a) the members of the class herein consist of all former employees of MERRILL LYNCH whose profit-sharing benefits were declared forfeit and have not been paid for the reason that such employees voluntarily left the employ of MERRILL LYNCH and thereafter engaged in an occupation determined by the Administrators and Trustees to be competitive with MERRILL LYNCH;

(b) the class members are estimated to be 250 persons or more, their precise number cannot be ascertained at this time, and joinder of all class members is impractical;

(c) plaintiff will fairly and adequately protect the interests of the class inasmuch as plaintiff is a member of the class and his claim is typical of the claim of all class members;

(d) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory relief with respect to the class as a whole;

(e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy; and

(f) the questions of law or fact which are common to the class include:

(i) whether forfeiture of the profit-sharing benefits for the reason stated in subparagraph (a) constitutes an unreasonable restraint of competition in violation of the legislative intent and public policy considerations of the Sherman Anti-Trust Act, 15 U.S.C.A. § 1, *et seq.*; the Internal Revenue Code of 1954, as amended, Subchapter D—Deferred Compensation, 26 U.S.C.A. § 401 *et seq.*; and, the Welfare and Pension Plans Disclosure Act, 29 U.S.C.A. § 301 *et seq.*

(ii) whether forfeiture for the reason stated in subparagraph (a) constitutes an unreasonable restraint against competition under the common law and exceeds the reasonable degree of protection necessary to protect the legitimate interest of the employer.

(iii) whether forfeiture of the profit-sharing benefits for the reason stated in subparagraph (a) enervates free competition in interstate commerce and unreasonably restrains without consideration the right of an average working man to earn his livelihood or exercise his calling in violation of the legislative intent and public policy considerations of the aforesaid statutes and the common law.

(iv) whether forfeiture of the profit-sharing benefits for the reason stated in subparagraph (a)

under profit-sharing plans qualified under the Internal Revenue Code of 1954, as amended, Subchapter D — Deferred Compensation, 26 U.S.C.A. § 401 *et seq.* are affected by a national public interest and such forfeiture violates the statutory intent that such benefits be for the "exclusive benefit" of employees.

(v) whether forfeiture of the beneficial interests of the PLAN for the reason stated in subparagraph (a) result in an unjust enrichment to others.

(vi) whether the profit-sharing benefits referred to in the PLAN are additional compensation in consideration of the services rendered.

(vii) whether forfeiture of the profit-sharing benefits for the reason stated in subparagraph (a) constitute an unenforceable penalty under the common law.

(g) The questions of law and fact common to the members of the class predominate over any questions affecting general members.

THE INVALIDITY OF THE FORFEITURE CLAUSE OF THE PLAN AND DECLARATORY RELIEF

Thirteenth: Plaintiff, in his own behalf, and in behalf of all members of the class similarly situated, respectfully alleges that the forfeiture provision of the PLAN is null, void and unenforceable and violates the legislative intent and public policy considerations of the aforesaid statutes as well as common law, upon the grounds that the said

forfeiture provision constitutes an unreasonable restraint upon competition against former employees and exceeds the reasonable degree of protection necessary to protect the legitimate interest of the employer.

Fourteenth: Plaintiff, in his own behalf, and in behalf of all members of the class similarly situated respectfully alleges that he and all members of the class whose profit-sharing benefits were declared forfeit for the reason stated in paragraph "Twelfth" hereof have no adequate remedy at law.

Fifteenth: Plaintiff, in his own behalf, and in behalf of all members of the class similarly situated seeks relief declaring that the forfeiture provision of the PLAN is null, void and unenforceable under the aforesaid statutes and the common law.

DAMAGES

Sixteenth: Plaintiff has been damaged in the sum of about Sixteen Thousand Dollars ($16,000.00) by reason of the forfeiture of his beneficial interests in the PLAN earned in the years of his employment by MERRILL LYNCH on and after December 30, 1960. Defendants have refused and still refuse to distribute and pay said beneficial interests to plaintiff, and plaintiff has been damaged thereby in the sum aforesaid, as have all of the members of the class similarly situate in the respective sums of their beneficial interest which were declared forfeit for the reasons stated in Paragraph "Twelfth" hereof.

WHEREFORE, plaintiff prays this Court for judgment against the defendants as follows:

(a) Adjudging and decreeing that the forfeiture provision of the PLAN is null, void and unenforceable;

(b) Adjudging and decreeing that plaintiff and each member of the class whose beneficial interests were declared forfeit for the reason stated in Paragraph "Twelfth" hereof be awarded judgment against the defendants in the respective sum or sums of their beneficial interests in the PLAN, with interest from the date of forfeiture;

(c) Adjudging and decreeing that defendants account to plaintiff and each member of the class;

(d) Adjudging and decreeing that plaintiff recover a reasonable attorney's fee and his expenses of this litigation, and

(e) Adjudging and decreeing that plaintiff and the members of the class have such other and further relief as the Court may deem just, together with the costs and disbursements of this action.

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Attorney for Plaintiff
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(212) OX 7-0722

Class Action Complaint

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM H. NOLAN, being duly sworn, deposes and says that deponent is the plaintiff in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

WILLIAM H. NOLAN

Sworn to before me this 14th day of August, 1974.

FRANK J. MELIORIS
Frank J. Melioris
Notary Public, State of New York
No. 31-7889900
Qualified in New York County
Commission Expires March 30, 1976

Excerpts from the Profit Sharing Plan for Employees of Merrill Lynch, Pierce, Fenner & Smith Incorporated annexed to the affidavit of Steven R. Narker, sworn to September 16, 1974.

ARTICLE 4.7

"Units, the value of which has been distributed to participants, shall be canceled. Units forfeited by participants shall be reallocated as of the end of the fiscal year among continuing participants of the previous year who are then regularly employed by the Corporation in the United States in proportion to their interests in the Trust Fund."

ARTICLE 7.1

"Upon severance of a participant's employment [other than by reason of death, retirement, or transfer to the employment of any subsidiary of the Corporation or any subsidiary thereof (herein called "Subsidiary")], the Committee shall within six months of such severance, direct the Trustees or such custodians or agents as shall be designated by the Trustees to pay to such participant, in a lump sum or in installments, in cash or in kind, all in the sole discretion of the Committee, the following amounts: . . ."

ARTICLE 22.1

"The validity of the Plan or of any of the provisions thereof shall be determined under and shall be construed according to the laws of the State of New York."